SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1511

ALAN D. MILLER, M.D., individually and as Commissioner of the New York State Department of Mental Hygiene and LAWRENCE P. ROBERTS, M.D., individually and as Director of Harlem Valley State Hospital,

Petitioners,

against

RITA HOOPER DALE, a former incompetent person,

Respondent.

REPLY BRIEF FOR PETITIONERS

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioners
2 World Trade Center
New York, New York 10047

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

DAVID H. BERMAN
Assistant Attorney General
of Counsel

TABLE OF CONTENTS

	PAGE
I—Replying to Respondent's Point I	1
II—Answering Respondent's Point II	3
III—Replying to Respondent's Point III	3
IV—Answering Respondent's Point IV	4
V—Replying to Respondent's Point V	5
Conclusion	8

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I

Replying to Respondent's Point I.

Since the holding of lack of adequate notice was based upon an imposed legal requirement that the notice had to be read to the respondent by the process server and explained, not required by New York statute or case law, there is no question of invading the lower court's "factual support for this finding" (Res. Br. p. 2). The matter is solely a question of law, as the Circuit Court said (App. "B", p. 32) and as discussed by petitioners in their brief.

The anomalous fact is that the District Judge found that respondent was mentally capable (App. "A") and ordered "that the incompetent status of the plaintiff" was "null and void". Obviously, if not mentally incapable, no one has explained why it was necessary to read the paper notice to her. In any event, the requirement imposed by the lower courts, if not reversed, would affect the multitude of similar state court orders not only in New York but elsewhere.

See discussion by District Judge Cooper (App. "F", pp. 45-50) in initially dismissing the complaint as to the "due process" contention of respondent.

If the personal service without more was inadequate, as held below as a matter of law, it was open to respondent to challenge the appointment of the committee in the state courts prior to or at the same time as the final account of the committee was before the state court. This was the procedure in the *City of New York* case cited by respondent (Resp. Br. p. 5) and to appeal even to this Court as in *Hansberry* v. *Lee,* likewise cited, from any adverse state court ruling.

Respondent's claim that "Petitioners are barred from now claiming that the District Court lacked jurisdiction to entertain respondent's claim" because the Circuit Court "on an earlier appeal held that the District Court had such jurisdiction" (Resp. Br. p. 6) is clearly without merit. This Court is not bound by the "law of the case" doctrine as enunciated in the lower court. *Mercer* v. *Theriot,* 377 U.S. 152 (1964), citing *Reece* v. *Georgia,* 350 U.S. 85, 87. See too: *White* v. *Higgins,* 116 F. 2d 312, 317 (1st Cir. 1940).

The attempt by respondent to downgrade the effect of this matter because "one solitary, elderly woman was held entitled to recover the [small] sum of $2,306.76 plus interest from petitioners" (Resp. Br. p. 6) overlooks, *inter alia,* the pervasive effect of the holding.

II

Answering Respondent's Point II.

Reliance by respondent upon *Monroe* v. *Pape* (Resp. Br. p. 7) must be an affront to any logic. Why Dr. Roberts who signed the petition must be held personally responsible because a process server not employed by him allegedly failed to personally read the application [prepared and submitted by the Attorney General] to respondent is beyond any comprehension and it stretches credulity to state such alleged failure of the process server to be "the natural consequences of his actions" [in signing the petition].

The attempt to support the liability cast upon Dr. Miller is an exercise in futility. What difference did it make to petitioner that "He did nothing [after 1966 when he was appointed] to change the procedures by which committees were appointed" even if this be a fact, which is not before the courts. Respondent's claim concerns 1962, five years before this Commissioner was appointed. The injunctive relief and class actions status in the complaint, with which the action started, were eliminated by District Judge Cooper and the elimination sustained in the first appeal (App. "G", pp. 71-72) and this is not before this court.

Furthermore, there is not a scintilla in the record or outside the record that Dr. Miller had anything to do with the application for the appointment of the successor committee, other than that it occurred chronologically shortly after his "tenure" began as Commissioner, and that the State's Attorney General received notice.

III

Replying to Respondent's Point III.

The fall-back by respondent upon the recent case of *Scheuer* v. *Rhodes*, 413 U.S. 919, —— S.Ct. —— clearly fails to override the consideration of the immunity of Dr.

Miller, as Commissioner, or of Dr. Roberts especially in view of the concession by respondent upon the first appeal in the Circuit Court [which we noted in our application, Br. p. 12] "that the defendants were guilty of no wrongdoing, carelessness or absence of good faith," a fact which District Judge Cooper commented upon in his decision upon the motion to dismiss (App. "F") as did the Circuit Court (App. "G", pp. 64-67).

We find no indication in *Scheuer* that this Court intended to abolish the application of immunity in actions under Section 1983. On the contrary, we believe that the doctrine as set out in *Pierson v. Ray*, 386 U.S. 547, 555 and *Barr* v. *Mateo*, 360 U.S. 564 was fully pertinent here to relieve the petitioners of any *vicarious* liability for the asserted consequences of the non-action of the process server. It was conceded by respondent that there is no claim of bad faith. In any event, the question of the immunity of mental hygiene officials should receive the attention of this Court.

The attempt of respondent to dispose of the immunity question upon the "law of the case" doctrine (Resp. Br. pp. 9-10) is misplaced, as we have pointed out (*supra*, p. 3).

IV

Answering Respondent's Point IV.

Since there is no claim here that either of respondents personally received any part of the funds paid to the committees we see no relevance to respondent's effort to challenge the application of *Edelman* v. *Jordan*, 412 U.S. 937, 94 S.Ct. —— and the other cases cited (Resp. Br. p. 10), because it was "her *own* funds" (Emphasis in original, Br. p. 107).

It is undisputed that the liability imposed upon petitioners is simply because of official status involved in the application by the State through its Attorney General for the appointment of the committee (App. "G"). There can be no question but that such liability "must be paid from the public funds in the State Treasury . . ." as set out in *Edelman* whether the amount is "modest" or not (Resp. Br. p. 107). Obviously if the Department of Mental Hygiene had been the defendant rather than the Commissioner or its employee, Dr. Roberts, sovereign immunity would have been applicable. Apart from that the Department would not be a "person" under the Civil Rights Act. *Cheramie* v. *Tucker,* 493 F. 2d 587, 587-8 (5th Cir. 1974). Merely substituting for the Department, Drs. Miller and Roberts, can not be held to avoid this rule of law. The principle of sovereign immunity reenunciated in *Edelman* is not to be circumvented by this contention or by the attempt to limit it to "retroactive benefits never paid" (Id.).

V

Replying to Respondent's Point V.

Respondent's claim that petitioner "was not parties or privies to either of the state court accountings" and that, therefore, the doctrine of *res judicata* does not apply is factually erroneous and contrary to law. The State through the Attorney General appeared and filed its claim which was approved. There is no question but that the petitioners' relationship was sufficiently close [as employees of the Department] to satisfy the test of "privies," Restatement of Judgment 83 (1942), if identity of parties is required which appears to be discarded by New York. *B.R. DeWitt Inc.* v. *Hall,* 19 N Y 2d 141, 225 N.E. 2d 195 (1967); *S.T. Grand, Inc.* v. *City of New York,* 32 N Y 2d 300, 304, 298 N.E. 2d 105 (1973); *Blonder-Tongue* v. *Univ.*

Foundation, 402 U.S. 313 (1971); *Rosenberg* v. *Martin*, 478 F. 2d 520, 525 (2d Cir. 1973); *Ritchie* v. *Landau*, 475 F. 2d 151, 155 (2d Cir. 1973). The *Gass* case cited by respondent (Br. p. 11) has no relevance. It simply held that the State was not required to file its claim. But here it did.

None of the state cases cited by respondent under "B" (Id.) sustain the extravagent statement. They dealt with questions as to the amount due for care and maintenance, as the Court of Appeals itself stated (App. B, p. 33). The contention of lack of jurisdiction because of lack of service could be raised at any time, unless waived, no matter what is the form of the proceeding. See App. "G", p. 31. *Antalek* v. *Elliott*, 26 A D 2d 716, 271 N.Y.S. 2d 746 (1966), N.Y. Civil Practice Law and Rules 5015(4).

Since the respondent had an adequate opportunity to raise the asserted jurisdictional question in the state court proceeding in which she ultimately appeared by her attorney, the order of the state court was conclusive against her as to any such contention. *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573 (1973); *Grubb* v. *Public Utilities Comm.*, 281 U.S. 470, 477-78 (1930). This is so despite the difference in the form of the actions. *Parker* v. *McKeithen*, 488 F.2d 553, 557-58 (5th Cir. 1974). The respondent herself emphasizes this by arguing that the "state court accountings were void" (Br. p. 12) (although, as has been noted, she appeared by her attorney and might be held to have waived any jurisdictional objection).

This is apart from the representation of respondent by a guardian *ad litem* upon the accountings (Br. p. 13), whose appointment under New York law must include prior notice (C.P.L.R. 1202) to the alleged incompetent *Abrams* v. *Abrams*, 24 A D 2d 970, 265 N.Y.S. 2d 381 (1965), and may not be dispensed. There has never been any claim that respondent did not receive such notice. The

failure of the guardian *ad litem* to file an answer, for instance, in an action would have the effect of a default of the party represented indicating the statutory jurisdictional affect of the appearance of such guardian (C.P.L.R. 1203).

Finally, the statement of respondent (Br. p. 13) that petitioners "failed to raise this point as an affirmative defense, properly pleaded and proved" has the air of a negative pregnant. The petitioners did plead *res judicata* based on the state court proceedings which were before the lower court. The answer of defendants Miller and Roberts, submitted to the District Court, stated:

> "NINETEENTH: In the facts and circumstances aforesaid, the judgment sought by the plaintiff on a cause of action for money had and received requiring the defendants, Miller and Roberts, officers of the State of New York, to return to plaintiff and all members of the class, all monies paid by their committees for the care and treatment at State hospitals, to which they had been committed, is not only barred by the doctrine of *res judicata,* but also by collateral estoppel, since it appears that the final account of Hahn, as her Committee, and the final account of Pious, as her Successor Committee, were judicially settled and approved and that each was judicially discharged respectively as such Committee and Successor Committee. It includes not only questions already settled by the orders in the judicial settlement of the Committees' accounts, but also questions which might have been and should have been raised and settled."

Such records were before the courts as a matter of judicial notice. *Berkowitz* v. *Philadelphia,* 303 F. 2d 585, 587 (3rd Cir. 1962) and were discussed in the various opinions.

CONCLUSION

The petition raises substantial questions which ought to be reviewed by this Court.

Dated: New York, New York, July 10, 1974.

Respectively submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioners
2 World Trade Center
New York, New York 10047

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

DAVID H. BERMAN
Assistant Attorney General
of Counsel